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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1984

STATE OF DELAWARE,

Petitioner,

v.

WILLIAM A. FENSTERER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE CONFRONTATION CLAUSE REQUIRE AN EFFECTIVENESS OF CROSS-EXAMINATION TEST WHEN NO EXTRA-JUDICIAL STATEMENTS ARE INTRODUCED AND THE WITNESS' LAPSE OF MEMORY IS THE SUBJECT OF UNRESTRICTED CROSS-EXAMINATION?

II. IF A WITNESS' LACK OF MEMORY VIOLATES THE CONFRONTATION CLAUSE, DOES THAT VIOLATION REQUIRE AUTOMATIC REVERSAL OF THE CONVICTION WITHOUT REGARD TO THE HARMLESSNESS OF THE ERROR?

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PETITION FOR WRIT OF CERTIORARI

The State of Delaware, petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Delaware Supreme Court entered May 1, 1985.

OPINION BELOW

The opinion of the Supreme Court of Delaware dated May 1, 1985 is not yet officially reported. It is reproduced in the Appendix to this Petition beginning at App. B-1.

JURISDICTIONAL GROUNDS

The judgment of the Delaware Supreme Court, reversing Fensterer's second degree murder conviction, was

entered on May 1, 1985.[1] A timely motion for reargument or, in the alternative, rehearing *en banc* before the Delaware Supreme Court was denied June 10, 1985. App. at A-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Although the judgment below vacated the convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented. *Florida v. Meyers*, — U.S. —, 104 S.Ct. 1852, 1853 n.* (1984) (per curiam); *California v. Stewart*, 384 U.S. 436, 497, 498 n. 71 (1966) (decided with *Miranda v. Arizona*).

CONSTITUTIONAL PROVISION INVOLVED

1. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

2. Although not directly involved in the questions presented, the following provisions of the Delaware Code were involved in the prosecution and are reproduced in the Appendix at C-1. 11 *Del. C.* § 635(1); 11 *Del. C.* § 636 (a) (1); 11 *Del. C.* § 3507.

[1] Delaware appellate practice does not provide for any separate document known as a judgment. Rather the clerk enters a docket notation based on the final paragraph of the written opinion.

STATEMENT OF THE CASE

A jury found William A. Fensterer guilty of murder in the second degree[2] involving the death of his girlfriend, Stephanie Swift, on September 28, 1981. On appeal, the Delaware Supreme Court reversed the conviction, deciding that under the Confrontation Clause, the defense cross-examination of a prosecution witness, Alan Robillard, was ineffective because of Robillard's failure to remember the factual basis for one of his conclusions. The court, implicitly applying an automatic reversal rule it had in previous cases derived from the Confrontation Clause, refused to consider whether Robillard's memory lapse, as constitutional error, was nonetheless harmless error. The first question presented by this petition is whether the Confrontation Clause creates a minimal standard of "effective" cross-examination. If that question is answered in the affirmative, the petition then raises the issue of whether the Confrontation Clause requires automatic reversal for that type of error.

1. The Killing

In June 1981, William A. Fensterer and Stephanie Swift were living together in an apartment building in Milford, Delaware. After the couple set up housekeeping, they occasionally had what Fensterer described as "discussions" about her relationships with other men.[3] Tr.

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[2] 11 *Del. C.* § 635(1) [App. C-1].

[3] Citations to the trial transcript (Tr.) will be by volume and page numbers, followed by the witness' name. The prosecution's trial exhibits will be cited as "S.Exh."

XI-91-93 (W.A. Fensterer). One such discussion took place in July 1981 when Fensterer returned to his home to find Swift in the company of one Jeff Cooper and another male visitor. A similar discussion occurred a month later when Fensterer again found Cooper in the apartment with Swift. Tr. XI-91-93 (W.A. Fensterer). Although Fensterer admitted to normal feelings of jealousy toward Cooper, he denied arguing with Swift about either incident. He was upset, however, when John King, a friend of Swift, called her about three weeks before her death. The recurring dispute over Swift's contact with King flared again in a trip to Atlantic City, New Jersey by Swift, Fensterer, and Swift's grandmother [Tr. IV-146-50 (Shellar)] although Fensterer testified that no such problem arose that weekend. Tr. X-97 (W.A. Fensterer).

The couple returned from Atlantic City on the evening of Sunday, September 27, 1981. According to Fensterer the last time he saw Swift alive was the next day when the two met for lunch. Tr. X-43, (W.A. Fensterer). After lunch, at about 1:30 p.m., Fensterer returned to work where he stayed until 4:55 p.m. When he returned to their apartment after work, Swift was not yet home. Soon thereafter, Fensterer went to Swift's parents, arriving between 6:15 and 6:30 p.m.[4] Fensterer claimed that he remained there until 7:00 or 7:30 p.m., but three witnesses testified that the car Fensterer claimed to be driving was in front of his apartment at that time. In addition, the car Swift was last seen in was then parked next to Fensterer's car. Tr. VI-10-14 (Sheppard). Swift's car was

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[4]The telephone company records show a call at 5:42 p.m. and Mrs. Swift testified that Fensterer arrived about one half hour after he called. Tr. V-51 (S.A. Swift).

next seen at a shopping center at about 8:15 p.m. [Tr. V-136-142 (Jenkins)] and at about 9:45 a.m. the next morning, her body was discovered in the car [Tr. IV-6 (Cohee)].

In a search of the couple's apartment, done with Fensterer's consent, the police recovered a blue cat leash.[5] Two police officers testified that Rick Huff, a friend of Fensterer who was present during the search, told them that he had seen Fensterer apparently wiping the leash through his hands. Huff stated that this occurred after Fensterer had been told by one of the police officers that the leash might be evidence. Tr. X-35, 36 (Bogdon). Huff also told the officers that before they arrived, he observed Fensterer talking to himself. While looking down at the floor, in a posture that suggested anguish, the defendant was heard to say, "I'm sorry. I'm sorry. I'm sorry Stephanie." Tr. X-33 (Bogdon).

The police also found two notes from Fensterer addressed to Swift. The note found in plain view expressed concern for Swift's safety and omitted reference to Fensterer's anger. S.Exh. 36. A second note expressing anger and Swift's lack of responsibility was found crumpled in the bathroom waste can. S.Exh. 26.

2. The Trial

Fensterer was charged with first degree murder. At trial, the prosecution presented both testimony and physical evidence establishing circumstantially that Fensterer had the motive, opportunity and means to kill Swift. Fen-

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[5]Swift's handbag and wallet were also recovered from the apartment, [Tr. X-11-13 (Bogdon)] and robbery was discounted as a motive. Swift's engagement ring, which Fensterer had recently given her, was, however, never recovered.

sterer's motive was jealousy; he had the opportunity to kill when he returned from Swift's parents' house and he had possession of the murder weapon—the blue cat leash. Fensterer presented counter expert testimony[6] and an alibi defense.

The trial lasted almost a month during which the leash found in the apartment was the subject of various expert testimony. First, the medical examiner determined that the strangulation marks on Swift's neck were entirely consistent with the leash and its metal fastener having been wrapped around the neck and then pulled. Secondly, a substance was found on the leash that matched the color of the vomitus that was present under Swift's nose when she was found. Chemical analysis of the material on the leash revealed that its composition was consistent with that of vomitus.

The leash used as the weapon was also suggested by the presence of two hairs which were entangled in the leash. An FBI expert, Alan Robillard, testified the hairs were wrapped around the leash several times. Tr. VII-68 (Robillard). There was no dispute that the two hairs were almost certainly those of Stephanie Swift; both Robillard and a defense expert in the same field, Dr. Peter DeForest, testified that the two hairs from the leash were similar to known samples of the victim's hair. Tr. X-135 (DeForest).

The two experts disagreed, however, on the question of whether one of the two hairs had been "forcibly removed." Robillard explained that by "forcibly removed,"

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[6]His experts countered most of the State's expert testimony and particularly disputed evidence on the time of death.

he meant that the hair could have been removed with as little force as might be applied by "brushing your hand through your head or brushing your hair." Tr. VII-95-96 (Robillard).

The forcible removal issue did not take the defense by surprise. It was first mentioned in the *voir dire* examination of Robillard that was conducted by defense counsel. Counsel first asked whether Robillard would offer an opinion on the question, to which Robillard responded affirmatively. Counsel then asked whether any formal scientific studies had been published which supported the theory that the presence of a follicular tag[7] indicated that it had been forcibly removed. Robillard stated that he could cite no published studies, but based on his own observations and experience, he believed that the presence of a follicular tag indicated forcible removal. The only defense objection to Robillard made at this point was a question of his qualification, as an expert, under state evidence rules.

During direct-examination, Robillard was asked to explain his conclusion that one of the hairs on the leash had been forcibly removed:

> A. With regard to the hairs that were removed from State's Exhibit 28, I found one of the hairs to have connective tissue or skin or the root was elongated which is an indication that the hair had been forcibly removed. One of the two hairs. The other hair was not forcibly removed.
>
> Q. There are three specific ways to determine whether a hair has been forcibly removed.
>
> A. In my experience, yes, sir.

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[7]The follicular tag is connective tissue which comes with the hair follicle. Tr. VII-89-90 (Robillard).

Q. Those are the three you described?

A. Yes, sir.

Q. In this case, which one of those areas do you recall occurring in this case?

A. I have reviewed my notes and I have no specific knowledge as to the particular way that I determined that the hair was forcibly removed other than the fact that one of those hairs was forcibly removed.

Q. So you don't know which category it falls?

A. No, sir.

Tr. VII-77-78 (Robillard).

The defense expert supplied the information that escaped Robillard's memory. DeForest testified that he had spoken with Robillard about Robillard's findings and learned that his conclusion was based on the presence of the follicular tag rather than by the presence of skin or an elongated root. DeForest added that he also observed the follicular tag when he examined the hairs under the microscope. DeForest then proceeded to challenge the theory on which Robillard's testimony had been based, arguing that no adequate scientific study had been done to determine whether forcible removal of hair was shown by the presence of a follicular tag. In the absence of a definitive study, DeForest posited that the follicular tag might be attached to many hairs that fall out naturally.

The jury acquitted Fensterer of first degree murder but convicted him of the lesser included offense of second degree murder.

3. The Delaware Supreme Court, "Effective" Cross-Examination, and the Automatic Reversal Rule.

On appeal, the Delaware Supreme Court reversed Fensterer's conviction. The Court concluded that Robil-

lard's lack of memory as to the scientific theory upon which he relied in concluding that one hair was forcibly removed denied Fensterer his right of effective cross examination. App. at B-10. Consistent with the Delaware automatic reversal rule in Confrontation Clause cases as announced in *Van Arsdall v. State*, 486 A.2d 1 (Del. 1984), *cert. granted*, — S.Ct. — (1985) (No. 84-1279) and *Weber v. State*, 457 A.2d 674 (Del. 1983), the court concluded: "We have no choice but to reverse Fensterer's conviction. For us to do anything else would prevent the right of a person to confront the witnesses against him in a criminal trial." App. at B-10. The court declined to conduct a harmless error analysis as urged by the State, instead determining that Robillard's testimony could have been completely discredited on the issue of the forceful removal of one hair. At no point did the Delaware court consider the insignificance of that single point to the prosecution.[8]

The Delaware court has, in *Fensterer*, created a rule that mandates reversal whenever it decides that cross examination was ineffective in some ill-defined fashion based on the Confrontation Clause. Although the court in this case did not expressly rely on *Van Arsdall* or *Weber* to reach its decision in this case, the application of the automatic reversal rule is clear in Fensterer's case. The harmlessness of the perceived error was not considered, and the Court held that it had "no choice" but reversal because

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[8]The Court also declared, without reference to a harmless error analysis, that a complete discrediting of Robillard's testimony on the removal of the hair "would have reflected poorly on the accuracy of the identification of the two hairs on the leash as Stephanie's." App. at B-10. Reflecting the Delaware court's consistent refusal to apply a harmless error analysis to Confrontation Clause errors, the court failed to recognize that the identity of the hairs was not disputed.

to do anything else would undercut a defendant's constitutional right of confrontation. App. at B-10.

REASONS FOR GRANTING THE WRIT

1. THE DELAWARE SUPREME COURT'S INTERPRETATION OF THE CONFRONTATION CLAUSE IS INCONSISTENT WITH DECISIONS OF THIS COURT.

In the decision below the Delaware Supreme Court held, as a matter of federal constitutional law,[9] that the inability of Alan Robillard, an F.B.I. special agent with expertise in hair analysis, to remember the underlying basis for his opinion violated the Fensterer's right of confrontation. The Delaware Court reasoned that this memory lapse denied Fensterer "effective" cross-examination. App. at B-9-10. The record clearly shows that cross-examination of Robillard was unrestricted and his lack of memory was freely exposed to the jury. Tr. VII-80-93 (Robillard).

A. When the witness testifies and is subject to cross-examination the Confrontation Clause does not impose an "effectiveness" test

The Delaware Supreme Court expressly found that Fensterer's attorney "conducted a cross-examination of

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[9]The Delaware Supreme Court clearly and unequivocally ruled that Fensterer's right under the Confrontation Clause of the Sixth Amendment to the United States Constitution was violated, thus requiring reversal. App. at B-6. The Sixth Amendment right of confrontation is applicable to state court proceedings via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

Agent Robillard, focusing upon the discrediting of the follicular tag theory." App. at B-9. However, the court held that the lapse in memory rendered cross-examination constitutionally ineffective. By doing so, the Delaware court overlooked this Court's refusal to establish "some inevitably nebulous threshold of effectiveness." *Ohio v. Roberts*, 448 U.S. 56, 73 n. 12 (1980). *Roberts*, of course, involved the admission of prior-testimony under the hearsay rule and this Court held that in all but "extraordinary" cases, an inquiry into effectiveness was not required. *Id.* Fensterer's case does not involve prior testimony, or even prior statements,[10] but rather the unlimited cross-examination of a witness, albeit an expert witness, who suffered a memory lapse. There is no principled reason for an appellate review to determine "effectiveness" of the cross-examination in such circumstances.

In the context of prior statements, this Court has left open the question of whether a witness' memory lapse "so affected [the defendant's] right of cross-examination as to make a critical difference in the application of the Confrontation Clause." *California v. Green*, 399 U.S. 149, 168-69 (1970).[11] Additionally, the Court has examined the

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[10]Under Delaware law, the prior statements of witnesses who take the stand and are subject to cross-examination are admissible as evidence. 11 *Del. C.* § 3507 [App. C-1]; *Keys v. State*, 337 A.2d 18 (Del. 1975); *Johnson v. State*, 338 A.2d 124 (Del. 1975) (no Confrontation Clause violation when witness had limited recall when testifying); *Burke v. State*, 484 A.2d 490 (Del. 1984) (lack of memory did not violate Confrontation Clause). *Fensterer* raises serious questions as to the continued reliance upon § 3507 in such cases by the prosecution.

[11]Because extra-judicial statements were not introduced by the prosecution, this open question is not squarely presented.

"adequacy" of cross-examination when limitations were placed upon its scope. *Davis v. Alaska*, 415 U.S. 308 (1974). However, absent external restrictions on cross-examination or the introduction of hearsay evidence, this Court has never suggested that the Confrontation Clause requires an independent minimum standard to test the effectiveness of cross-examination. The decision below thus marks an extreme departure from the current understanding of Confrontation Clause rights.[12]

B. The opportunity for cross-examination affords an adequate basis to evaluate the witness' testimony.

This Court has consistently held that the right of confrontation is provided when the witness is present to testify and submits to cross-examination. *Ohio v. Roberts*, 448 U.S. at 63; *Nelson v. O'Neill*, 402 U.S. 622, 626 (1971); *California v. Green*, 339 U.S. at 162 (1970). Recognizing that cross-examination is "the 'greatest legal engine ever invented for the discovery of truth,'" *Green*, 339 U.S. at 158 (quoting 5 J. Wigmore, Evidence §1367 (3rd ed. 1940)), this Court has noted that a purpose of cross-examination is to "uncover . . . lapses of recollection." *Green v. McElroy*, 360 U.S. 474, 497-98 (1959). In *California v.*

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[12]Indeed in a recent law review article reviewing this Court's cases on criminal procedure citing *California v. Green*, the authors observed:

> If a witness is available for cross-examination at trial, the fact that he displays a lack of memory preventing the most effective cross-examination is not a violation of the Confrontation Clause.

Project: *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and the Courts of Appeals, 72 Geo. L. J. 249, 593 (1983).*

Green, the Court recognized that the core values furthered by the Confrontation Clause lie in the literal right to "confront" so that "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 399 U.S. at 157-58 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)). In this prosecution, the core guarantees of the Confrontation Clause were preserved. Fensterer tested the recollection of Robillard and was afforded the opportunity of unrestricted cross-examination. By most criteria of successful cross-examination, Fensterer was highly successful in pointing out Robillard's faulty memory.

Although Robillard did not remember the specific basis for his opinion, Fensterer had received that information through criminal discovery procedures and used it in his defense. DeForest, Fensterer's hair expert, testified that he had interviewed Robillard who informed him that the scientific basis for the agent's opinion was the follicular tag theory. TX-125-126 (DeForest), App. D-1-2. Fensterer was thus not prejudiced by any lack of discovery,[13] and

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[13]In support of its decision, the Delaware Supreme Court cites *United States v. Diogaurdi*, 428 F.2d 1033, 1038 (2nd Cir.), *cert. denied*, 400 U.S. 825 (1970) and *United States v. Kelly*, 420 F.2d 26, 29 (2nd Cir. 1969). Those cases do not raise Confrontation Clause issues but rather the Jencks Act *(Diogaurdi)* and Criminal Rule 16 *(Kelly)*. In both cases, the Second Circuit ruled that the defendant was entitled to the informational basis of the expert opinion. Here, the defendant had the information and used it. TX-125-126 (DeForest), App. D-1-2.

the jury was not deprived of the means to test the accuracy of Robillard's testimony.

When an expert analyzes hair, it is examined under a microscope. *See* Inwinkelreid, *Forensic Hair Analysis: The Case Against Underemployment of Scientific Evidence,* 39 Wash. & Lee L. Rev. 41, 51 (1982). Robillard forgot which growth stage[14] the hairs were in and whether he observed a follicular tag, misshaped root, or a sheath of skin on the hair root.[15] Tr. VII-86-87 (Robillard). That information, however, was presented to the jury through the testimony of the defense expert. DeForest, who examined the hairs and noted his observations, testified that they were in the telogen growth phase [Tr. X-129 (DeForest)], and that the follicular tag was present on one of the hairs. Tr. X-132, 136 (Deforest).[16] The dispute between the experts was principally scientific. Robillard testified that science can establish if hair in the telogen

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[14]There are three principal growth phases of hair: 1) anagen; 2) catagen; and 3) telogen. Tr. VII-35-36 (Robillard); Tr. X-126-127 (DeForest).

[15]DeForest's memory of this observation was not perfect either:

> Q (Prosecutor): When you first observed the hairs that were found on the leash did you not observe the follicular tag?
>
> A (Dr. DeForest): I have no conscious recollection of observing it, but it was very apparent when I went back to it.

Tr. X-139 (DeForest).

[16]The three scientific methods used to determine whether a hair has been forcibly removed are: 1) the presence of the follicular tag on the hair; 2) the presence of an elongated and misshapen root; and 3) the presence of a sheath of skin surrounding the root area. App. at B-7.

phase was "forcibly" removed. Tr. VII-90 (Robillard). DeForest testified that forcible removal can only be established when hair is in the earlier, anagen growth phase and an external root sheath tissue is adhering to it. Tr. X-133 (DeForest). Because DeForest's observations are uncontradicted, the principal issue between the experts was thus not factual but rather a disagreement as to the acceptability of using the follicular tag in the telogen phase to determine forcible removal.

Fensterer however chose not to refresh Robillard's recollection with the prior statements to Dr. DeForest. For presumed tactical reasons, he decided to present to the jury a direct confrontation between an FBI agent who could not remember the basis for his opinion and his own expert. On cross-examination Fensterer refreshed Robillard's memory on some points but not on this now crucial point.[17] The jury had sufficient information to judge Robillard's credibility and to assess the value of the "expert opinion," albeit through Fensterer's trial tactics in examining his own expert. The opportunity to cross-examine was presented and the Confrontation Clause is satisfied. *See Roberts,* 448 U.S. at 70. Arguably Fensterer could have been more effective had he confronted Robillard with the prior statement but there is no constitutional basis for rewarding the defendant for a miscalculated tactical decision on confronting witnesses. As in *Roberts,* it is inappropriate to examine the "inevitably nebulous" question of the "effectiveness" of cross-examination when the opportunity was clearly afforded to the defendant.

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[17]Defense counsel used a report to refresh Robillard's recollection on an examination of a bed sheet, pillow, pillow case and mattress cover. Tr. VII-81-82 (Robillard).

Compounding the error, the Delaware court then fails to consider this tactical decision by Fensterer and summarily dismisses DeForest's testimony about Robillard's prior statement as "[n]ot the equivalent of Robillard acknowledging the theory upon which he relied." App. B-9 n. 5. Such "acknowledgement" is not a constitutionally required predicate of confrontation. The Court in *Nelson v. O'Neil* rejected "acknowledgment" by a witness of a prior statement as necessary for full and effective cross-examination in the context of a *Bruton*[18] situation. 402 U.S. at 627-629. Thus, "full and effective" cross-examination is afforded when the declarant is present at trial, takes the witness stand, testifies fully as to his activities, but denies making the statement and asserts that its substance is false. *Nelson,* 402 U.S. at 629-630. The applicable standard is then not an "inevitably nebulous" effectiveness inquiry of cross-examination absent extraordinary circumstance. Because testing recollection is a primary purpose of cross-examination [*Mattox v. United States,* 156 U.S. at 242-43], a witness's memory lapse, not in the context of a hearsay issue, does not warrant such an approach. Moreover, in light of *Nelson,* the Delaware Supreme Court's requirement that Robillard acknowledge or state the basis of his opinion is artifice unsupported by the Confrontation Clause.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER STATES SUPREME COURTS AND FEDERAL COURTS OF APPEALS.

There is no support for the Delaware Supreme Court's Sixth Amendment analysis of "effective" cross-examina-

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[18]*Bruton v. United States,* 391 U.S. 123 (1968).

tion in cases, such as Fensterer's, where extra-judicial statements are not introduced by the prosecution. Finding that such issues of feigned or actual memory loss are questions for the jury,[19] the Fifth Circuit found no violation of the Confrontation Clause. *Blakenship v. Estelle,* 545 F.2d 510, 517 (5th Cir. 1977), *cert. denied,* 444 U.S. 856 (1977). In a case more similar to Fensterer's, the Seventh Circuit has found no violation of a defendant's right of confrontation when the government's expert was unable to recall the literature spectra upon which he based his analysis, lost or destroyed the standard spectra, and failed to disclose technical information (patented computer programs). *United States v. Bastanipour,* 697 F.2d 170, 176 (7th Cir. 1982), *cert. denied,* 103 S.Ct. 1790 (1983). The Seventh Circuit found no constitutional deprivation of meaningful cross-examination, and the question was viewed as a matter of weight, not of admissibility. *Id.* at 177. Unlike *Bastanipour,* the information in Robillard's memory lapse was fully available to Fensterer and presented by him to the jury.

Even in cases involving prior-statements, the Delaware court's "effectiveness" test finds little support. Recognizing that the Court in *Green* expressly left the question open, the clear majority of courts impose no test to determine if memory lapses prevent "effective" cross-examination. As the United States Court of Appeals for the Third Circuit held:

> But if he has been sworn and made available the fact that he suffers or feigns a loss of memory does not

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[19]Fensterer's objections to Robillard's testimony were overruled by the trial judge who found that the objections go to "weight rather than its admissibility." Tr. XIII-21 (Judge Wright).

> lessen the fact that the defendant has been confronted with him and presented with the opportunity to cross-examine him to the extent possible, which is all that the Sixth Amendment requires.

United States ex rel. Thomas v. Cuyler, 548 F.2d 460, 463 (3rd Cir. 1977). *Accord United States v. Murphy,* 696 F.2d 282, 284 (4th Cir., 1982), *cert. denied,* 461 U.S. 945 (1983); *United States v. Insana,* 423 F.2d 1165, 1168 (2nd Cir. 1970), *cert. denied,* 400 U.S. 841 (1970). In similar cases involving prior statements, the Sixth and Seventh Circuits have not reached the "effectiveness" question left open in *Green,* finding the memory lapses to be "so selective as to be incredible." *Vogel v. Percy,* 691 F.2d 843, 846 (7th Cir. 1982); *United States v. Shoupe,* 548 F.2d 636, 643 (6th Cir. 1977). The Eighth Circuit appears to apply a case-by-case analysis. *United States v. Rogers,* 549 F.2d 490 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977).

Three state supreme courts have similarly found no confrontation violation when a loss of memory purportedly makes cross-examination of a witness about a prior statement less effective. *See Robinson v. State,* 306 N.W. 2d 668 (Wis. 1981); *State v. Gustafson,* 266 N.W.2d 878 (Minn. 1978); *People v. Pepper,* 568 P.2d 446 (Colo. 1977). *Contra State v. Lomax,* 608 P.2d 959, 964-67 (Kan. 1980). Prior to *Fensterer* the Delaware Supreme Court clearly accepted this analysis when "other indicia of reliability" were present. *Burke v. State,* 484 A.2d 490 (Del. 1984).

The Delaware rule of "acknowledgement" thus completely lacks support. Generally, an "effectiveness" test is not required even when a prior statement by a witness with a present memory lapse is admitted. Instead, the Delaware court has created with no support and out of constitutional whole cloth a test which this court has previously referred to as being "inevitably nebulous."

3. THIS PETITION SHOULD BE CONSIDERED TOGETHER WITH OR HELD PENDING A DECISION ON THE DELAWARE AUTOMATIC REVERSAL RULE IN DELAWARE v. VAN ARSDALL, NO. 84-1279.

The State of Delaware suggests that it is appropriate to consolidate this petition with, or hold pending decision in, *Delaware v. Van Arsdall, cert. granted,* — U.S. —, — S.Ct. — (1985) (No. 84-1279).

Van Arsdall presents the following question:

> Under the Confrontation Clause, when a prosecution witness relates facts which the defendant has conceded, does an erroneous restriction of the defendant's cross-examination of that witness require reversal without consideration of the harmlessness of the error?

The Delaware Supreme Court, consistent with its automatic reversal rule as announced in *Van Arsdall* and *Weber v. State,* 457 A.2d 674 (Del. 1983), reversed Fensterer's conviction instead of considering, as urged by the State, the harmlessness of any error. The court found that it had "no choice" because anything but reversal would "prevent the right of a person to confront the witnesses against him in a criminal trial." App. at B-10.

The appropriate relationship between Confrontation Clause error and the guidelines for the harmless error analysis described in *Chapman v. California,* 386 U.S. 18 (1967) is presently before the Court in *Van Arsdall.*[20] As

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[20]In *Van Arsdall,* the trial court prevented the defendant from questioning a prosecution witness about a prior misdemeanor arrest and dismissal. In its petition, Delaware did not contest the determination of error in restriction of the cross-examination. Petition for Writ of Certiorari at 9 n. 16 (filed February 7, 1985).

this case represents yet another application of its automatic reversal rule by the Delaware Supreme Court, consideration with *Van Arsdall* is appropriate. Although the determination of harmlessness may appropriately be considered by the Delaware Supreme Court in the first instance, petitioner suggests that the record below clearly supports such a harmless error analysis. The identity of the hair on the cat leash was not in dispute. Tr. X-135 (DeForest). Hair analysis was only a portion of the State's evidence that the cat leash was the murder weapon. The medical examiner testified that the strangulation marks on Swift's neck were entirely consistent with the leash [Tr. IX-22 (Tobin)], and a substance on the leash matched the vomitus present under Swift's nose by color [Tr. IV-123 (Tigue)] and chemical analysis [Tr. VII-101-102 (Martz)]. More importantly Fensterer himself does not challenge the presence of a "forcibly" removed hair on the cat leash. He attempts to explain it by testifying that Swift would carry the leashed cat on her shoulders. Tr. XI-120 (W.A. Fensterer). A harmless error analysis would include not only these and other evidentiary points but also consider the trial judge's charge to the jury on expert testimony.[21] The trial judge expressly charged the jurors to consider not only the qualifications of the expert but also the expert's means of knowledge and his reasons for the conclusion. The jury was also instructed to evaluate expert testimony as they would other evidence. As Pe-

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[21]This Court has recently recognized that the "assumption that jurors are able to follow the Court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue." *Tennessee v. Street*, — U.S. —, 85 L.Ed.2d 425, 436 n. 6 (1985).

titioner argues in *Van Arsdall,* the Delaware Court's conclusion that it had "no choice" but reversal [App. B-10] is not required by the Confrontation Clause. Thus, assuming constitutional error, the important jurisprudential and societal policies upon which the harmless error rule is based mandate consideration by the Delaware Supreme Court of the harmlessness of this "error."

CONCLUSION

For the above reasons, this Court should grant this petition for certiorari and reverse the decision of the Delaware Supreme Court. Alternatively, this petition should be considered with or held pending a decision in *Delaware v. Van Arsdall,* No. 84-1279.

Respectfully submitted,

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August 8, 1985

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

No. 60, 1984

WILLIAM A. FENSTERER,

Defendant Below-Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below-Appellee.

Submitted: May 16, 1985
Decided: June 10, 1985

Before HERRMANN, Chief Justice, McNEILLY, HORSEY, MOORE and CHRISTIE, Justices, constituting the Court en Banc.

ORDER
(Filed June 11, 1985)

This 10th day of June, 1985,

Upon due consideration of the State's Motion for Reargument and/or Rehearing en Banc filed pursuant to Supreme Court Rules 18 and 4 (f), and finding said Motion to be without merit,

NOW, THEREFORE, IT IS ORDERED that the Motion for Reargument and/or Rehearing en Banc be, and it hereby is,

DENIED.

BY THE COURT:

/s/ John J. McNeilly
Justice

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

No. 60, 1984

WILLIAM A. FENSTERER,

Defendant Below-Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below-Appellee.

Submitted: February 19, 1985
Decided: May 1, 1985

(Filed May 2, 1985)

Before McNEILLY, HORSEY and CHRISTIE, Justices.

Upon appeal from Superior Court. Reversed and Remanded.

Harold Schmittinger and Charles Whitehurst of Schmittinger & Rodriguez, P.A., Dover, for appellant.

John A. Parkins, Chief of Appeals Division, Timothy J. Donovan, Deputy Attorney General, Wilmington, and Gary A. Myers, Deputy Attorney General, Georgetown, for appellee.

McNEILLY, Justice:

On Tuesday morning, September 29, 1981, the body of Stephanie Ann Swift was found in a blue Camaro in the parking lot of the Milford Plaza Shopping Center. She was the victim of an apparent strangulation. On November 2, 1981, Stephanie's fiance, William A. Fensterer, was arrested and charged with Murder in the First Degree.

The State's case against Fensterer was based upon circumstantial evidence. The jury found Fensterer guilty

of the lesser included offense of Murder in the Second Degree. He appeals to this Court for relief from his conviction.

I

The facts of this case, consisting of events preceding the death of Stephanie Ann Swift, the subsequent investigation of her death, and the proceedings against Fensterer, are voluminous. We summarize the facts in a manner sufficient to give a background to the case, then discuss other factual happenings as we analyze the various issues raised on this appeal.

William A. Fensterer was a twenty-three year old bookkeeper-accountant working at an agriculture products establishment in Milford, Delaware, known as The Reeds, Inc. He began dating Stephanie Ann Swift on a regular basis and by June of 1981, they were living together at 715 Parson Thorne Apartments in Milford. They became engaged to be married. Stephanie was a seventeen year old high school student at Indian River High School. She previously had dropped out of high school, but after meeting Fensterer, she resumed school and was commuting from their Milford apartment to complete her senior year. Stephanie commuted with Fensterer's blue Camaro, and Fensterer used her black Cougar since the Cougar was not in appropriate mechanical condition to be driven the distance to the high school.

Three days before Stephanie's murder, on Friday, September 25, 1981, Fensterer and Stephanie embarked on a weekend trip to Atlantic City. The couple left their pets at Stephanie's parents' home in Possum Point, near Millsboro, Delaware. The couple went on the trip with Mrs. Shellar, Stephanie's grandmother. The relationship be-

tween the couple over the weekend is subject to dispute. Mrs. Shellar testified that Fensterer had mentioned a former boyfriend of Stephanie's, John King, and that he was afraid Stephanie was seeing King again. Mrs. Shellar testified that thereafter the relationship between Fensterer and Stephanie became strained. In contrast, Fensterer testified that neither their relationship nor the weekend were strained. It is uncontroverted that after the trip Fensterer and Stephanie returned to their Milford apartment at approximately 6:00 p.m. on Sunday. That night, Fensterer did some laundry and cooked dinner while his fiancee worked on a report for school.

The following day, Monday, September 28, 1981, Stephanie Ann Swift was murdered. The events of that day began with Stephanie and Fensterer having sexual relations that morning before Fensterer went to work at approximately 8:00 a.m. Fensterer, as usual, drove Stephanie's black Cougar, leaving Stephanie his blue Camaro. Fensterer and his co-workers testified that he remained at work until approximately 12:30 p.m. when Stephanie met him at work for lunch. Although, Lee Shepard, the manager of their apartment complex, testified that between 10:00 a.m. and 12:00 noon, he saw the Cougar in the Milford apartment parking lot. Regardless, it is uncontested that at 12:30 p.m. Fensterer and Stephanie went to the bank, then to Pasquales Restaurant for lunch, and then returned Fensterer to work at approximately 1:30 p.m. The couple was seen at Pasquales by witnesses who testified that the couple seemed to be happy and were holding hands upon leaving the restaurant. After returning Fensterer to work, Stephanie went shopping. The last person to see Stephanie alive was a sales lady in The Dollar General Store, around 2:00 that afternoon.

It is uncontested that Fensterer worked until around 4:55 afternoon. Upon leaving work he drove back to their apartment and discovered that Stephanie was not there. He waited until 5:42 p.m. and then called Stephanie's parents, the Swifts, and asked if anyone had seen Stephanie. He looked through Stephanie's dresser drawers and found some old letters from Stephanie's past boyfriends. He then wrote Stephanie a note chastising her for not picking up their pets they left at her parents while on their Atlantic City trip. The note read:

> Steph,
>
> If and when you deside [sic] to come home, I think it would be in your best interest to keep your ass in the house. I've waited for an hour and half for you! I thought you were supposed to pick up the animals at 5:00!! Where the f . . k are you! I'm worried to death about you, but also so f . . . . .g p . . . . d off! Were's your respensibility [sic] girl!
>
> Bill
>
> I went to pick up the animals.

What happened the remainder of the evening remains in dispute. We do know that sometime that evening Fensterer made a one hour round trip to the Swifts (approximately 56 miles) and picked up the couple's pets and that at 8:13 that evening, sometime after returning from the Swifts, he called the Swifts to see if they had yet to hear from Stephanie.

The State contends that the events of that evening began with Fensterer going to the Swifts' home at around 6:15 or 6:20 p.m.; that he returned to the Milford apartment between 7:00 and 8:13 p.m. Upon returning to the apartment, the State contends that a jealous Fensterer

strangled his fiancee with their blue cat leash. The State contends that Fensterer carried Stephanie's body out of the apartment, put her in the Camaro, and abandoned her with the Camaro in the Milford Plaza Shopping Center parking lot.

On the other hand, the defense presnts a different version of the events of that Monday evening. Fensterer contends that he did not leave Milford until around 6:30 that night; that he arrived at the Swifts around 7:15 p.m. and that it was around 8:00 p.m. when he returned to the apartment.

Witnesses for the State and defense dispute the time of Stephanie's death. Dr. Judith Tobin, Assistant State Medical Examiner, testified at trial, after giving several different prior conclusions as to the time of Stephanie's death, that it was her then current belief that Stephanie had died between 2:00 p.m. and 10:00 p.m. on September 28, 1981, but more probably between 3:30 p.m. and 8:00 p.m.[1] The defense witness, Dr. Cyril Wecht, a certified forensic pathologist and professor at the University of Pittsburgh School of Medicine, Duquesne University and

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1. Dr. Judith Tobin gave several different estimated times of death. Detective Michael Tigue of the Delaware State Police, who assisted the Milford Police Department in the investigation, testified that Dr. Tobin told him on September 29, 1981 that the time of death was between 6:00 p.m. and 7:00 p.m. Dr. Tobin issued the first death certificate on September 30, 1981, listing the probable time of death as between 8:00 p.m. and 12 midnight. On the second certificate issued on November 9, 1981, Dr. Tobin listed the time of death as between 2:00 p.m. and 10:00 p.m. Also Detective Bogdon, the principle investigating officer of the Milford Police Department, testified that Dr. Tobin told him prior to the preliminary hearing that the time of death was between 3:30 p.m. and 7:30 p.m.

Pittsburgh School of Dentistry, testified that Stephanie had died around 4:00 p.m. on September 28th.

We do know that the next day, Tuesday, September 29, 1981, Fensterer went to the Milford Police Department to file a missing person's report on Stephanie. At 9:43 a.m., the body of Stephanie Ann Swift was found in the Milford Plaza Shopping Center. Next to the Camaro she had driven, was a brown cord approximately 25 inches in length. There was a black hair on Stephanie's leg that blew away before police could save it.[2] The blue cat leash, the alleged murder weapon, was found in the couple's apartment.

II.

We first address Fensterer's contention which we believe is meritorious and upon which ground we reverse his conviction. Fensterer's contention is that testimony of Special Agent Allen Robillard of the Federal Bureau of Investigation, was inadmissible under the Confrontation Clause of the Sixth Amendment to the United States Constitution.[3]

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2. Fensterer asserted that this was significant since Stephanie's hair was blond and his hair is brown.

3. In addition to the Confrontation Clause argument, Fensterer contends that Special Agent Robillard's testimony was inadmissible under Delaware Rule of Evidence 705 and under *Frye v. United States*, D.C. Cir., 293 F. 1013 (1923). We do not address these contentions due to our reversal on Confrontation Clause grounds.

We do note, however, our rejection of the *Frye* test as an independent controlling standard of admissibility, in *Whalen v. State*, Del. Supr., 434 A.2d 1343 (1980), cert. denied 455 U.S. 910 (1982). The pertinent Delaware Rules of Evidence regarding admission of scientific testimony are Delaware Rules of Evidence 402, 702, and 403. *See State v. Williams*, Me. Supr., 388 A.2d 500 (1978), *U.S. v. Downing*, 3rd Cir., 753 F.2d 1224, 1237 (1985).

A.

The State sought to prove by circumstantial evidence that the blue cat leash found in the couple's apartment was the murder weapon. The State sought to establish that two hairs found on the leash bore similar characteristics to Stephanie's hair. In addition, the State sought to establish that one of the hairs on the leash was forcibly removed from the victim, thereby implying to the jury that one of the hairs had been pulled out during the strangulation of the victim. The State sought to prove its theories by the testimony of Special Agent Allen Robillard.

Agent Robillard testified that one of the hairs found on the leash had been forcibly removed from the head. He explained that there were three theories upon which a determination could be made that hair had been forcibly removed. The theories were: 1) The presence of the follicular tag on the hair, (2) the presence of an elongated and misshaped root, and (3) the presence of a sheath of skin surrounding the root area. As to which theory he relied upon in coming to his conclusion, the following colloquy transpired at voir dire:

> A. Let me step back one step with regard to the presence of the follicular tag. That is one of the ways that I am able to determine hair is forcibly removed. There are two other possible ways.
>
> As to the exact manner in which this particular hair was forcibly removed, I don't know. I have no indication in my notes other than the fact it was forcibly removed.
>
> So to answer your question about the follicular tag, yes, that is possible that it was there.
>
> Q. You have no indication in your notes how you determined that this hair was forcibly removed?

A. Other than the fact it was forcibly removed, that's true. I have no indication. I do have personal knowledge that it was based on one of the three characteristics.

Q. One of the three characteristics. Do you remember which one it was?

A. No, sir, I don't.

Again, in his direct examination testimony Agent Robillard stated: "I have reviewed my notes, and I have no specific knowledge as to the particular way that I determined the hair was forcibly removed other than the fact that one of those hairs was forcibly removed". Agent Robillard displayed the same lack of knowledge, as to the basis for his conclusion, when cross-examined by defense counsel.

B.

While Fensterer contends that Agent Robillard's testimony denied him his rights under the Confrontation Clause,[4] the State contends that the defense had a strong indication that Agent Robillard had relied upon the presence of a follicular tag to reach his conclusion. Moreover, the State contends, Fensterer was not denied effective cross-examination since defense counsel did try to discredit the follicular tag theory.

The Sixth Amendment guarantees the right of the accused to be confronted with the witnesses against him.

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4. The United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ."

U.S. Const. amend VI.

Confrontation means more than being allowed to confront the witnesses physically. The primary interest secured by the Clause is the right of cross-examination. *Douglas v. Alabama,* 380 U.S. 415 (1965), *Ward v. State,* Del. Supr., 395 A.2d 367 (1978). Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *David v. Alaska,* 415 U.S. 308, 316 (1974). The government has a serious obligation not to obstruct a criminal defendant's cross-examination of expert testimony. *United States v. Dioguardi,* 2nd Cir., 428 F.2d 1033, 1038, cert. denied, 400 U.S. 825 (1970), *United States v. Kelly,* 2nd Cir., 420 F.2d 26, 29 (1969).

In the case at bar, the State is correct in one respect. Fensterer's attorney conducted a cross-examination of Agent Robillard, focusing upon the discrediting of the follicular tag theory. The defense presented its expert witness Dr. Peter DeForest of Hartsdale, New York. Dr. DeForest testified that scientific authority contradicted the Agent's theory that the presence of a follicular tag indicated the hair had been forcibly removed.

Nonetheless, we are unable to accept the State's argument that Fensterer's counsel was able to conduct an adequate cross-examination of Agent Robillard. A Special Agent from the Federal Bureau of Investigation can appear to be a highly credible person to the average lay jury. Effective cross-examination and discrediting of Agent Robillard's opinion at a minimum required that he commit himself to the basis of his opinion.[5] Without

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5. Dr. DeForest's testimony that sometime before trial Agent Robillard told him that he (Robillard) relied upon the follicular tag theory, is not the equivalent of Agent Robillard acknowledging the theory upon which he relied.

an acknowledgment of the basis of his opinion, defense counsel's cross-examination of the Agent was nothing more than an exercise in futility.

A matter which is highly material deserves extensive cross-examination. *Skinner v. Cardwell*, 9th Cir., 564 F.2d 1381, 1389, (1977) cert. denied, 435 U.S. 1009 (1978). Agent Robillard's conclusion that a hair on the leash was forcibly removed was a highly material issue in this case. The conclusion showed that at least one hair on the leash was from the strangulation, and thereby established the leash as the murder weapon. The leash belonged to Fensterer and Stephanie.

Moreover, we cannot rule out the possibility that had Agent Robillard committed himself to the theory upon which he rested his conclusion, he could have been completely discredited. A complete discrediting of the Agent's testimony that one hair was forcibly removed would have reflected poorly on the accuracy of the Agent's other testimony, including his testimony on the identification of the two hairs on the leash as Stephanie's.

In sum, although we cannot say for sure what would have happened if Agent Robillard disclosed the scientific theory upon which he relied, we do know that without such a disclosure, Fensterer was denied his right to effectively cross-examine a key state witness. We have no choice but to reverse Fensterer's conviction. For us to do anything else would pervert the right of a person to confront the witnesses against him in a criminal trial.

III

Notwithstanding the fact that we reverse and remand Fensterer's conviction on Confrontation Clause grounds,

the more favorable remedy accorded a reversal upon speedy trial grounds compels us to delineate our rejection of that contention of Fensterer.

Fensterer contends that he was denied his right to a speedy trial under the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Constitution of the State of Delaware.[6] He contends that the twenty-six month delay from November 2, 1981, the date of his arrest, to January 9, 1984, the date of his trial, denied him a speedy trial.

A defendant has no greater right to a speedy trial under Article I, Section 7 of the Delaware Constitution than he has under the Sixth Amendment to the United States Constitution. Therefore, our analysis of Fensterer's state constitutional challenge parallels that of his federal claim.[7] *See Shockley v. State*, Del. Supr., 269 A.2d 778 (1970) (state speedy trial right interpreted in light of federal precedents).

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6. The United States and Delaware Constitutions provide in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ."

U.S. Const. amend VI. Article I, section 7 of the Delaware Constitution, using similar language, says:

> "In all criminal prosecutions, the accused hath a right . . . to have . . . a speedy and public trial. . ."

7. The only difference in determining Fensterer's rights under Article I, Section 7 of the Delaware Constitution is that his own actions weigh more heavily against him. *Key v. State*, Del. Supr., 463 A.2d 633, 638 (1983). In light of our analysis herein, Fensterer suffered no violation of his state speedy trial right.

What constitutes a speedy trial is variable, depending upon the facts of the individual case. *Stacey v. Delaware,* Del. Supr., 364 A.2d 819, 820 (1976) (citing *Beebe v. State,* Del. Supr., 346 A.2d 169 (1975)). To determine whether a speedy trial violation has occurred, the United States Supreme Court in *Barker v. Wingo,* 92 S.Ct. 2182 (1972), set forth a balancing test in which the conduct of both the prosecution and defendant are weighed. The Court identified some of the factors to be weighed as: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id., Stacey v. Delaware, supra, State v. Morris,* Del. Super., 340 A.2d 846, *affirmed,* Del. Supr., 349 A.2d 748 (1975). We proceed then, to consider the factors enumerated in *Barker,* seriatim.

Length of delay

As to this first factor, the United States Supreme Court said "[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry in the other factors that go into the balance." *Barker* at 2192.

Here, the State concedes that the 26 month delay is not so brief so as to preclude inquiry into the remaining *Barker* factors. Indeed, at face value, a delay of twenty-six months causes us concern. Thus, the *Barker* test is triggered, and we proceed with a weighing of the factors.

The reason for the delay

Fensterer contends that the prosecution engaged in "foot dragging" and intentionally delayed his trial. The

State contends that the delay was caused by the defense's piecemeal discovery and crowded court dockets.

A deliberate attempt to delay trial in order to hamper the defense will be weighed heavily against the state, while a more neutral reason such as negligence or overcrowded courts will be weighed less heavily. *Barker* at 2192. On the other hand, delay caused by the defendant's own actions cannot be weighed against the State. *Key v. State,* Del. Supr., 463 A.2d 633, 637 (1983), *Brown v. Slayton,* W.D. Va., 342 F. Supp. 61 (1972), *See United States v. McGrath,* 2nd Cir., 622 F.2d 36, 41 (1980).

Upon a thorough review of the record, there is no evidence of bad faith or deliberate delays on the part of the prosecution. In contrast, the more obvious reason for the delay was Fenterer's [sic] own piecemeal discovery and his motions. A review of the docket entries reveals numerous discovery requests and motions filed by the defense:

December 7, 1981	Motion for Discovery
January 26, 1982	Supplemental Motion for Discovery
February 16, 1982	Motion to Suppress (hearing held January, 1983 and decided March, 1983)
February 17, 1982	Motion to Inspect Grand Jury Testimony
May 10, 1982	*Brady* Motion
June 3, 1982	Bill of Particulars
September 9, 1982	Supplemental Request for Discovery

March 17, 1983 — Second *Brady* Motion (involved briefing; order issued September, 1983)

The necessity for briefing and oral argument on some of Fensterer's motions cannot be weighed against the State. The State is not expected to surrender its meritorious legal arguments so that a defendant may be brought to trial more quickly.

Overall, the only delay that can be reasonably attributed to the State is about 6 months of the delay to hear Fensterer's Suppression Motion due to congested Court dockets, and possibly a month or so of delay caused by sluggish responses to discovery requests. We conclude that the rest of the twenty-six month delay can be directly attributed to Fensterer's piecemeal discovery and motions. By electing to file motions raising preliminary legal questions Fensterer cannot now reasonably argue that the State delayed his trial.

Summarizing the first two of our four relevant factors, this case was one of delay which causes us concern, but the delay was caused primarily by Fensterer's own elections.

Defendant's assertion of his right

Fensterer filed motions to dismiss premised upon speedy trial grounds on November 30, 1982 and on January 5, 1984. Both motions were denied. The State contends that a motion to dismiss is not a demand for a speedy trial, and, therefore, Fensterer has failed to assert his right. Such an argument is preposterous.

The State's reliance upon *Barker v. Wingo, supra,* and *Latson v. State,* Del. Supr., 146 A.2d 597 (1958) is mis-

placed. In both cases the motions to dismiss filed by the defense did not state speedy trial as the ground for dismissal. Here, Fensterer's motions were explicitly premised upon his right to a speedy trial.

Certainly, Fensterer has asserted his speedy trial rights throughout the course of his prosecution.

Prejudice to the defendant

This fourth and last factor we conclude, weighs against Fensterer. The *Barker* Court explained that prejudice "should be assessed in light of the interests of defendants which the speedy trial right was designed to protect." *Id.* at 2193. The Court continued that the interests were: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accsued; and (iii) to limit the possibility that the defense will be impaired." *Id.*

As to the first interest, Fensterer has no argument that he suffered "oppressive pretrial incarceration" since he was free on bail shortly after his arrest.

The second interest, the anxiety of the accused, is to some extent present in any case. There is no reason to believe that Fensterer suffered any more anxiety than any other person charged with first degree murder.

The last interest is actual prejudice to the defense's case. There was no prejudice to Fensterer's case caused by the delay in trial. All his witnesses were still available at trial time.

Fensterer contends he was prejudiced by three key witnesses all changing their testimony since the date of arrest. But at least one of the three witnesses, Dr. Judith

Tobin, began changing her testimony the day after Stephanie's body was found.[8] Moreover, the three witnesses were prosecution witnesses. The various versions of their testimony was prejudicial to the State since defense counsel was effectively able to impeach them on the inconsistencies.

In addition, Fensterer contends he was prejudiced by Agent Robillard's inability to recall which one of the theories he relied upon to come to his conclusion that hair on the cat leash was forcibly removed from the head. The prejudice suffered by Fensterer which resulted from the Agent's testimony was caused by the error of the Trial Court in admitting the testimony; not caused by the delay in trial. As we explained earlier, Agent Robillard's testimony was inadmissible under the Confrontation Clause. If his testimony had been properly excluded, Fensterer would not have been prejudiced.

To sum up the prejudice factor, with no pre-trial incarceration, no more than normal anxiety and little impairment of the ability of the defense to present its case, this factor weighs in favor of the State.

After our examination of the above factors we balance and weigh them for a determination of whether a speedy trial violation has occurred. We conclude that the balance tips against Fensterer. What tips the scale in that direction are the reasons for the delay, Fensterer's time consuming motions and piecemeal discovery, as well as the absence of demonstrable and appreciable prejudice to Fensterer's ability to present his defense.

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8. *See* note 1 *supra*.

IV

Fensterer also contends that the Trial Court abused its discretion in failing to seqeuster the jury, and that he was denied a fair trial by improper comments made by the prosecutor during closing argument. In light of our reversal on Confrontation Clause grounds, we do not address these issues. We do address briefly Fensterer's contention that the Trial Judge abused his discretion by giving a second "*Allen*-type" charge where the jury did not request a rereading of the charge.[9]

The first "*Allen*-type" charge was given on Thursday, February 2, after the jury had deliberated approximately four hours and reported itself deadlocked. The Trial Judge gave the charge from memory. The jury deliberated on Friday and then adjourned for a three-day holiday weekend. The jury returned on Tuesday, February 7, and was immediately given a complete second "*Allen*-type" charge. The jury deliberated four hours and reached its verdict.

In *Brown v. State,* Del. Supr., 369 A.2d 682 (1976), this Court recognized that a supplementary instruction referred to as an "*Allen*-type" charge or "dynamite charge" is generally proper to encourage a jury to reach a verdict, but we cautioned:

> However, a trial judge may not coerce the jury into reaching a verdict and, for that reason, any such charge must be carefully examined to determine its total effect on the jury in reaching a verdict.

Brown at 684. *Hyman Reiver & Co. v. Rose,* Del. Supr., 147 A.2d 500 (1958).

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9. *See Allen v. United States,* 164 U.S. 492 (1896).

Upon consideration of all the circumstances in this case, we do not believe the giving of two "*Allen*-type" charges was coercive. Both charges contained the admonition referred to in *Brown v. State*.[10] Also, the fact that the jury deliberated four hours after the second charge is an indication that the charge itself was not coercive. Furthermore, along with the giving of the second "*Allen*-type" charge, the jury was told, as requested by defense counsel, that it need not deliberate an unreasonable length of time before being discharged. These factors lead us to conclude that the "*Allen*-type" charges, in this case, did not have a coercive effect on the jury.

Although we do not embrace Fensterer's contention that a reading of a second "*Allen*-type" charge is per se reversible error, Trial Courts should heed our advice that multiple "*Allen*-type" charges be avoided. *Britt v. State*, Del. Supr., 402 A.2d 808, 810 (1979).

* * * *

REVERSED and REMANDED for proceedings consistent herewith.

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10. The admonition referred to in *Brown* is that "each individual juror not surrender his or her honest convictions and not to return any verdict contrary to the dictates of personal conscience." *Brown* at 684. The February 2nd instruction contained three such admonitions and the February 7th instruction contained two such admonitions.

APPENDIX C

Relevant Delaware Statutory Provisions

11 *Del.C.* § 635. *Murder in the Second Degree.*

A person is guilty of murder in the second degree when:

1) He recklessly causes the death of another person under circumstances which manifest a cruel, wicked and depraved indifference to human life.

* * *

11 *Del.C.* § 636. *Murder in the First Degree.*

A person is guilty of murder in the first degree when:

1) He intentionally causes the death of another person.

* * *

11 *Del.C.* § 3507. *Use of Prior Statements as Affirmative Evidence.*

a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.

b) The rule in subsection (a) of this section shall apply regardless of whether the witness's in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.

c) This section shall not be construed to affect the rules concerning the admission of statements of defendants or of those who are codefendants in the same trial. This section shall also not apply to the statements of those whom to cross-examine would be to subject to possible self incrimination.

APPENDIX D

Excerpts of Trial Transcript Volume X at 125-126
Direct Examination of Dr. Peter DeForest

[125]

* * *

Q. [defense counsel] Doctor, in connection with the review of evidence, did you also receive a copy of an F.B.I. report?

A. I did.

Q. What did that F.B.I. report indicate, if anything, about hairs which had been allegedly found on a leash?

A. Okay. It indicated that they were similar to those taken from the victim, the known hairs of the victim. With the normal caveats that are appended to any reports on hair at that time indicating the hair was not a definite means of identifying individuals. It indicated one of these hairs had been forcibly removed.

Q. Doctor, did you eventually learn the identity of the special agent of the F.B.I. who had analyzed the hair?

A. Yes, I did. I called a friend of mine in the laboratory down there and found out what the code that they use on the forms meant. The initials U.K. I learned that was Allen Robillard. I called him to discuss the results with him.

Q. Did you converse with Agent Robillard about the case?

A. I did.

Q. Doctor, would you briefly relate to the members of the jury what the substance of the conversation with Agent Robillard was?

A. I told him that I had examined the hairs and felt they

[126] were both in the telogen phase and couldn't understand how he could explain one of them had been forcibly removed.

He then indicated his criteria for forcible removal and I went back and looked at the hairs and found one of them did have a small follicular tag adhering to the root.

Q. Did you question him to the degree of force?

A. Then I called him back after I had made that discovery. He said well, he didn't mean to imply it was a lot of force. Any amount of force. Could be brushing. Could be running the fingers through the hair and so forth.

Q. Doctor, what did you say he indicated he based his conclusion on that the hair was forcibly removed?

A. The presence of the follicular tag.

* * *